

122nd meeting (2 May 1972)

Article 17 (continued)

Mr. GUEST (United Kingdom) recalled that article 17 had been referred to a small drafting group composed of the United Kingdom and USSR delegations. The USSR representative had had strong reservations with regard to the provisions of paragraph 2 of article 17 concerning actions by a subpurchaser against a buyer and also with regard to the extension of the limitation period in such cases. In the drafting group, the USSR delegation had maintained its opposition to the inclusion in the draft Convention of the provisions in question but a compromise had been achieved whereby they would be submitted to the international conference of plenipotentiaries in brackets to show that the Commission had reached no final conclusions. In the drafting group the USSR representative had adduced a number of arguments against the provisions. One related to the fact that even if a subpurchaser commenced an action against a buyer within the limitation period, the proceedings could take many years to come to judgement, although the text of article 17 would allow for an extension of one year from the date on which the legal proceedings ended - which might fall a considerable number of years after the original limitation period would have expired. The drafting group had considered that a valid argument and had therefore preferred to return to the régime established under article 20 of the original draft (A/CN.9/70), whereby the buyer was entitled to an additional period of one year from the date of the institution of proceedings for the purpose of obtaining recognition or satisfaction of his claim against the seller. The drafting group considered that a better rule as it would allow a buyer time to establish whether his claim was well-founded and because a period of one year was not inordinate. The drafting group had decided that paragraph 1 of article 17 should not be changed, that paragraph 2 should be placed in square brackets and that, in paragraph 3, all references to actions commenced by a subpurchaser against a buyer should be placed in brackets and that a new rule should be included, with the result that the text would read:

"(3) In the circumstances mentioned in this article, the creditor [or the buyer]

must institute legal proceedings against the party jointly or severally liable [or against the seller], either within the limitation period otherwise provided by this Law or within one year from the date on which the legal proceedings referred to in paragraphs 1 [and 2] commenced, whichever is the later." The words "whichever is the later" had been included because certain delegations otherwise found the text obscure.

Mr. LOEWE (Austria) observed that article 17 had twice been the subject of extensive debate in the Commission and stated that the new version had not removed his delegation's reservations with regard to the proposed rules. Although he would prefer the deletion of the entire article, the Commission could make some progress if it agreed to delete at least the square brackets. The increasing use of such brackets was an admission of the Commission's inability to achieve a compromise. If the Commission, which had 29 members, could not reach agreement it might well be asked how the considerably larger membership of the United Nations could do so. He proposed the deletion of the article as the wisest course.

Mr. MANTILLA-MOLINA (Mexico) said he felt no great enthusiasm for the text formulated by the drafting group but would not oppose it. He noted that paragraph 1 required a creditor to give a debtor written notification within the limitation period of the commencement of proceedings against him. He thought that rule should be amended somewhat to require that such notification should be given immediately upon the commencement of the limitation period or, in accordance with the approach in ULIS, within a short or reasonable time after such commencement. He also felt that paragraph 3 should refer simply to the parties to proceedings as the "comprador" and "vendedor".

Mr. FARNSWORTH (United States of America) agreed with the Austrian delegate regarding the removal of the brackets in the text. Paragraph 2 dealt with a most important problem in a very satisfactory way. It would be regrettable if, because of the square brackets, the international conference of plenipotentiaries did not give adequate consideration to that problem. He proposed the deletion of the square brackets.

Mr. KENNEDY (Australia) supported the United States proposal. His delegation's views regarding the importance of paragraph 2 were well known. The words within the brackets should certainly be retained. He could accept a lesser provision such as that contained in article 20 of the draft prepared by the Working Group at its third session (A/CN.9/70) although the ideal solution would be that which his delegation had first proposed in A/CN.9/V/CRP.16.

Mr. GUEST (United Kingdom) pointed out that the compromise reached by the drafting group had involved the retention of the square brackets in the text.

Mr. OGUNDERE (Nigeria) said that he could not agree with the Austrian representative that article 17 should be deleted altogether. The international conference of plenipotentiaries must have all the material necessary for it to draw up a final version of the draft Convention. He agreed with the United States representative that all square brackets should be removed from the text and pointed out that the reasons why they had originally been included could be explained in the commentary.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) said the fact that the drafting group had been composed of his own delegation and that of the United Kingdom was no accident. His delegation held the definite view that the provision contained in square brackets should be deleted as quite inconsistent with the spirit of the draft Convention. The agreed compromise was that it should be retained in brackets - a result which did not represent any concession by one group to another. The questions at issue were important and must be considered further.

Mr. KAMAT (India) pointed out that his delegation's position had been stated in the debate on the original text of article 17 (A/CN.9/70). He agreed entirely with the Austrian representative that it would be better to delete the whole of article 17. If it was not to be deleted, however, it would be quite unfair to place only the rule in paragraph 2 in brackets. The rule in paragraph 1, which was inequitable, should also be placed in brackets. The entire article should either be bracketed or deleted.

Mr. JENARD (Belgium) said that although, at first sight, he had been in favour of the text before the Commission he had come to the conclusion that it should be deleted. A major defect of the draft Convention was that it was excessively complicated. The rules proposed in article 17 regarding the establishment of dates were of logarithmic complexity and he considered that, being bizarre, they could only be a source of confusion and embarrassment to the creditor.

Mr. GUEIROS (Brazil) agreed with the Belgian representative that the article should be deleted altogether.

Mr. GUEST (United Kingdom) said that the representatives of Norway and France, neither of whom was present in the Commission, could certainly be expected to express strong opposition to any suggestion that the article should be deleted. The simpler course would be to place the entire article in square brackets and to record the views expressed during the current debate in the commentary.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to a compromise solution whereby the whole text of the proposed new article 17 would be placed in brackets and approved on the understanding that the views of delegations would be stated in the commentary on the article.

It was so decided.

Article 28 (continued)

Mr. JAKUBOWSKI (Poland) said that the general rule was stated in paragraph 1 and that paragraph 2 merely set forth one interpretation of the rule. Moreover, in the view of his delegation, paragraph 2 could lead to a conclusion contrary to that stated in paragraph 1. Paragraph 2 should therefore not be given the same weight as paragraph 1. He asked that his delegation's views be inserted in the commentary.

The CHAIRMAN said that the views of the Polish representative would be inserted in the commentary on article 28.

Draft decision proposed by the Working Group on Prescription

The CHAIRMAN drew attention to a draft decision proposed by the Working Group on Prescription (A/CN.9/V/CRP.26), whereby the Commission would (a) approve

the text of the draft Convention, (b) request the Secretary-General to prepare a commentary on its provisions, to circulate its text to Governments for comment and to prepare an analytical compilation of the resulting comments and proposals for submission to Governments and interested international organizations; and (c) recommend that the General Assembly should provide for the conclusion of a convention on prescription, possibly by an international conference of plenipotentiaries.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) pointed out that, in adopting the draft decision, the Commission would "approve" the text of the draft Convention. Yet the Commission had never even considered part IV of the draft Convention or its articles 37 and 38, while some provisions of the text which it had considered were still in square brackets. The language of the draft decision implied that the Commission had approved the entire draft Convention.

Mr. SAM (Ghana) said that his delegation had intended to make the same comments as the USSR representative.

Mr. HONNOLD (Secretary of the Commission) said that it was the intention that the draft decision should be included in the report of the Commission with any editorial changes necessary to make it perfectly clear which portions of the draft Convention had been approved and which had not. The Commission could not in any case approve the draft decision until it had considered the question of the financial implications of an international conference of plenipotentiaries to conclude a convention on prescription.

Mr. KAMAT (India) said that the subject-matter of the draft Convention and the complex issues of private law which it involved indicated that it should be considered by an international conference of plenipotentiaries rather than by the Sixth Committee of the General Assembly. He nevertheless wondered whether it was necessary for the Commission to make any firm recommendation to the Assembly in that connexion. The International Law Commission had recommended to the Assembly that an international conference on the representation of States in their relations with international organizations should be convened but at the twenty-sixth session of the Assembly a number of delegations had expressed the view that it would be better for the Sixth Committee to deal with the question.

It would be wiser for the Commission's report to state its views regarding the desirability of convening an international conference of plenipotentiaries and to leave the actual decision to the General Assembly.

Mr. RECZEI (Hungary) proposed that any draft decision adopted by the Commission should contain a paragraph expressing appreciation of the immensely valuable task performed by the Working Group on Prescription in preparing the draft Convention.

The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to complete consideration of the draft decision in the context of the adoption of its report.

It was so decided.

Mr. SLOAN (Director, General Legal Division), speaking as the representative of the Secretary-General, said that initial estimates by the Secretariat indicated that the over-all cost of an international conference of plenipotentiaries lasting three weeks would be approximately \$150,000 - on the assumption that it was convened in New York.

Mr. BURGUCHEV (Union of Soviet Socialist Republics) observed that although the figure announced by the Secretariat appeared to be very considerable, the Commission could consider it only in comparative terms. More details were necessary before it could be discussed.

The CHAIRMAN suggested that consideration of the financial implications of a diplomatic conference should be deferred until more details were available.

It was so agreed.

[The last part of the meeting was taken
up by the discussion of other matters]